(2)

No. 87-2118

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ and WENCESLAO GUTIERREZ, JR.,

Appellants,

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, Victoria Independent School District; and VAL HUVAR, County Clerk, County of Victoria,

Appellees.

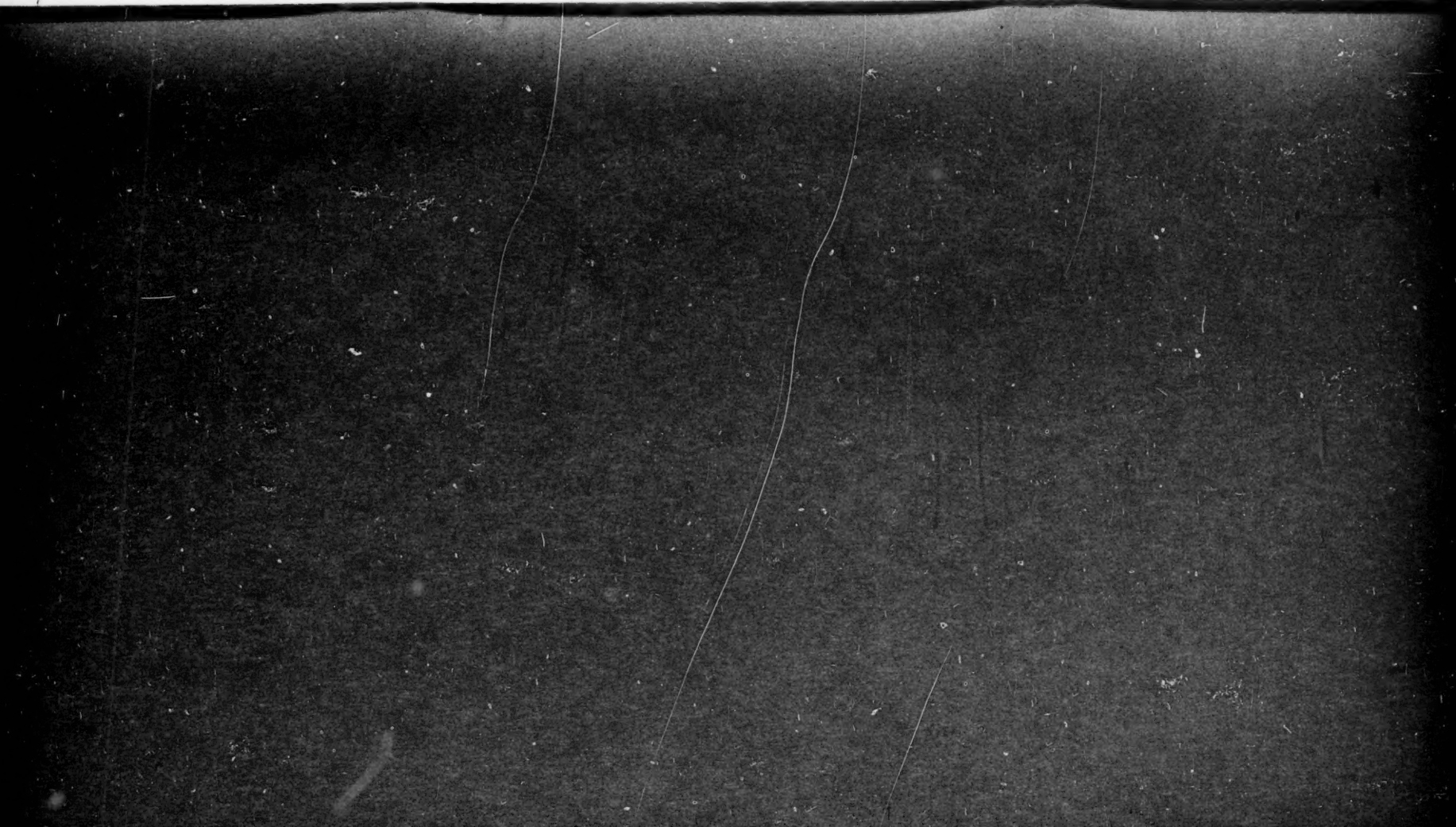
On Appeal From the United States District Court of the Southern District of Texas

MOTION TO DISMISS OR AFFIRM

M. L. NULL
ANDERSON, SMITH, NULL & STOFER
Post Office Box 1969
7th Floor—One O'Connor Plaza
Victoria, TX 77902
(512) 573-9191

Attorneys for Appellees

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831



QUESTION PRESENTED

Appellees respectfully submit that the following question is the only one genuinely raised in this case:

> Whether the Victoria Independent School District Board of Trustees must seek approval under section 5 of the Voting Rights Act of an agenda preparation policy that permits the Board President to require the approval of two Board members to secure placement of an item on the agenda?

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(c) and (d) of the Revised Rules of this Court, appellees move that this appeal be dismissed, or alternatively, that the judgment of the District Court be affirmed.

STATEMENT

After several months of very lengthy meetings, sometimes involving items that had been on the agenda more than once and voted down, the Board of Trustees of Victoria Independent School District (hereafter "Victoria Board") changed their agenda preparation policy, first to one requiring the request of two trustees to place an item on the agenda, but later, after objection by some trustees, to one which permitted any trustee to place an item on the agenda unless the Board President, depending on the nature of the item submitted, required the approval of two board members. This board agenda preparation policy is carried in the Victoria Board policy book as BE (LOCAL) and can be found in the Appendix to this Motion, p. 1a. The Board agenda preparation provisions of BE(LOCAL) requiring the approval of two Board members for an agenda item have never been used by any Victoria Board president since the day of adoption, November 20, 1986. Thinking that BE(LOCAL) required, without exception, the approval of two Board members to place an item on the Board agenda, the Voting Section of the Attorney General's Office wrote to the general counsel for the Victoria Independent School District and suggested that BE(LOCAL) "would seem" to require section 5 preclearance. (Appendix to Jurisdictional Statement, p. 14a). In response the correct agenda preparation policy was sent to the Voting Section to help them in their consideration of whether it needed preclearance and the suggestion made that it did not rise to the level of reallocating authority among two different governmental authorities dealt with in *Hardy v. Wallace*, 603 F.Supp. 174 (N.D. Ala. 1985), which was the admitted case being looked at by the Voting

Section for possible preclearance of BE(LOCAL). The response to the Voting Section inquiry can be found in the Appendix to this Motion, p. 5a. Nothing further has been heard from the Voting Section in connection with BE (LOCAL), although they were apparently invited by the appellants to come into the case below and continue to be furnished copies of the plaintiffs' filings in this case.

ARGUMENT

This is a section 5 coverage case, and as such, is narrow in its scope and application. The appellants' theory of submitting the internal agenda preparation policy of a local board to preclearance is admitted to be a novel one. The appellants do not and cannot cite a single case holding or even hinting that internal board agenda preparation policies are changes in voting procedure or the election process and, thus, subject to section 5 approval procedures. Even a casual reading of the only case relied upon by appellants, other than historical development cases, for section 5 coverage (*Hardy v. Wallace,* supra) will show that case in no way deals with agenda preparation by a local board or any other housekeeping function of a local board or anything in anyway analogous to the local policies of a single board. Moreover, the Court in *Hardy* made a specific determined effort to limit that case solely to the facts of that case by stating:

> "We emphasize that our conclusions in this case are reached within the ambit of its peculiar facts. They should not be read to support a requirement of section 5 preclearance in the myriad of conceivable situ-

ations that are somewhat analogous but lack the attributes that we have expressly found to be determinative." (p. 179).

In connection with *Hardy* it should also be noted that the Attorney General has characterized that case as involving the issue of section 5 coverage to reallocation of authority among different governmental bodies. See Attorney General comments to the revised procedures for administration of section 5 at page 488 of the *Federal Register*, Volume 52, No. 3, Tuesday, January 6, 1987.

The three-judge court below found that the Victoria Board's agenda preparation policy, BE(LOCAL) was beyond the actual election process and apparently felt that this was so clear it did not even require case citations. The lower court further found that BE(LOCAL) was an ordinary, routine modification of the duties or authority of elected officials which was beyond the reach of section 5 since such modification was "miniscule", in fact, "de minimus". (See Jurisdictional Statement, Appendix p. 1a for the opinion of the district court.) No reason has been shown why this opinion should not be affirmed.

An additional, and equally substantial, reason for affirming the judgment below is the entire absence from the appellants' statement of any showing of abuse of discretion in the denial of injunctive relief below as required by Rule 15(i) of the Revised Rules of this Court.

LACK OF SUBSTANTIALITY

Generally, the way local boards prepare their agenda would not seem to be a substantial question, certainly it would not require plenary consideration, with briefs and oral argument for resolution by this Court.

Appellants have not followed the requirements of Rule 15(h) of the Revised Rules of this Court and presented reasons why the questions presented are so substantial as to require plenary consideration with briefs and oral argument. What appellants do is simply state that the "questions presented are so substantial as to require plenary consideration" (Jurisdictional Statement, p. 11) and then go into a long historical development of section 5 to try to show that the opinion below "was clearly erroneous." Obviously, the appellants do not agree with the opinion below, but that does not make the question dealt with in that opinion "so substantial as to require plenary consideration." The appellants' disagreement with the opinion below hardly suffices for what Rule 15(h) requires.

From this it is clear that the questions on which the decision of this case depends are so unsubstantial as to not need further argument.

———o———

CONCLUSION

The decision below is correct, and this appeal presents no substantial question. It is, therefore, respectfully submitted that the appeal should be dismissed or the judgment of the District Court should be affirmed.

Respectfully submitted,

M. L. NULL
ANDERSON, SMITH, NULL & STOFER
Post Office Box 1969
7th Floor—One O'Connor Plaza
Victoria, TX 77902
(512) 573-9191

Attorneys for Appellees

APPENDIX

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A. Victoria Board Policy BE(LOCAL) 1a

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VICTORIA ISD 235902

BOARD MEETINGS	BE (LOCAL)
PLACE OF MEETING	Unless otherwise provided, Board meetings shall be held at the Education Center.
TIME OF MEETING:	Regular meetings of the Board shall be held on the third Thursday of each month at 4:30 p.m., unless otherwise provided by the Board.
SPECIAL OR EMERGENCY MEETINGS	The time for special and emergency meetings of the Board shall be as stipulated in the notice for the meeting.
AGENDA PREPARATION	The agenda for meetings of the Board normally will be closed at 5:00 p.m. on the seventh day preceding regular meetings and at noon on the third day preceding special meetings. Such requests shall be in writing and be sufficiently specific to inform other Board members and the public of the subject(s) to be discussed. The agenda shall be prepared under the direction of the Superintendent with the advice and consent of the President of the Board. Requests for agenda items may be made by any Board member. Depending on the nature of the items submitted, the President may require the approval of two Board members to secure placement of that item on the agenda.

The Superintendent must be notified of all agenda items.

NOTICE TO MEMBERS

Members of the Board shall be given notice of regular and special meetings at least seventy-two hours prior to the scheduled time of the meeting and at least two hours prior to the time of an emergency meeting.

EXECUTIVE SESSION

Notice of all meetings shall provide for the possibility of a closed or executive session during an open meeting, as provided by law. (See BEC)

ORDER OF BUSINESS

The order of business for regular Board meetings shall be as follows. The order of business may be changed by consent of a simple majority of all members present.

1. Roll call, establishment of quorum, call to order
2. Executive session(s), if any
3. Open forum
4. Reconvene in open meeting
5. Approval of Minutes of previous meeting(s)
6. Action items
7. Reports, discussion items
8. Adjournment

The Board may enter executive session at any time during the

	meeting, as permitted under the Open Meetings Act. (See BEC)
CALLED SPECIAL MEETINGS	The President of the Board shall call a special meeting at the President's discretion or on request by two or more members of the Board.
CALLING EMERGENCY MEETINGS	The president shall call an emergency meeting when the President or two or more members of the Board determine that an emergency or urgent public necessity warrants the meeting. Emergency meetings shall be callled only for bonafide emergencies which cannot reasonably be postponed until a special or regular meeting.
RULES OF ORDER	The Board shall observe the parliamentary procedures as found in *Robert's Rules of Order, Newly Revised,* except as otherwise provided in Board procedural rules or by law. Procedural rules may be suspended at any Board meeting by majority vote of the members present.
VOTING	Voting shall be by voice or show of hands, as directed by the President. Any member may abstain from voting and a member's vote or failure to vote shall be recorded upon that member's request. See BDAB (Local) for the Board President's voting rights.

MINUTES

Board action shall be carefully recorded by the secretary or clerk; when approved, these minutes shall serve as the legal record of official Board actions. The written minutes of all meetings shall be approved by vote of the Board and signed by the President and the Secretary of the Board.

The official minutes of the Board shall be retained on file in the office of the Superintendent and shall be available for examination during regular office hours.

DISCUSSIONS AND LIMITATIONS

Discussions shall be addressed to the President of the Board and then the entire membership Discussion shall be directed solely to the business currently under deliberation, and the Board President shall halt discussion that does not apply to the business before the Board.

The Board President shall also halt discussion if the Board has agreed to a time limitation for discussion of an item, and that time limit has expired. Aside from these limitations, the President shall not interfere with debate so long as members wish to address themselves to an item under consideration.

ADOPTED: 11/20/86

LAW OFFICES OF

ANDERSON, SMITH, NULL & STOFER
One O'Connor Plaza, Seventh Floor
Victoria, Texas

Conde N. Anderson
Munson Smith
M. L. Null
James N. Stofer
John D. Murphree
James H. Murray, Jr.
Ronald B. Walker
Richard T. Chapman, Jr.

Thomas J. Barry
Jerome A. Brown
Douglass L. Anderson
James E. Green
Antoinette L. Rahm
Janis L. Scott

Mailing Address
P.O. Box 1969
Victoria, Texas 77902

Telephone
(512) 573-9191

March 10, 1987

Mr. Gerald W. Jones
Chief, Voting Section
DEPARTMENT OF JUSTICE
Washington, D. C. 20530

Re: Your File Nos. DJ166-012-3 and
R7167

THIS IS *NOT* A SECTION 5 SUBMISSION

Dear Mr. Jones:

Reference is made to your letter dated February 27, 1987, concerning the Agenda Preparation Policy of the Victoria Independent School District.

The first paragraph of your letter refers to a new procedure of the Victoria District that prohibits an individual member from presenting agenda items and then quotes from that policy. In response to this paragraph, I would like to point out that no such procedure has been adopted and that the policy you quote from has never been adopted by the Victoria Board. The policy you quoted from was adopted by the Victoria Board on first reading on October 23, 1986, but was not adopted on second reading at the next Board meeting on November 20, 1986, and is not a policy of the Victoria District. From an administrative standpoint, it is felt that you should consider the precise Agenda Preparation Policy of the Victoria District before any determination is made with reference to preclearance pursuant to Section 5.

To help you in your consideration of the actual Agenda Preparation Policy of the Victoria Board, I am attaching to this letter a statement by the Victoria District's Superintendent, Dr. Larry R. Vaughn, which discusses such policy and the reason for the policy and also attaches actual copies of the policy as first proposed and as finally adopted.

From a legal standpoint, I would like to add that I agree with the comments of the Attorney General in the Tuesday, January 6, 1987, *Federal Register,* Page 488, that the case of *Hardy v. Wallace,* 603 F.Supp. 174 (N.D. Ala. 1985) and the cases cited after that citation involves the issue of reallocation of authority among different governmental bodies. It seems clear that agenda preparation by a local school board does not rise to the level of reallocating authority among two different government bodies.

Please let me hear from you after the reconsideration proposed herein.

Very truly yours,

M. L. Null

MLN:bhs
Enclosure

cc: Dr. Larry R. Vaughn, Superintendent
VICTORIA INDEPENDENT SCHOOL DISTRICT
Post Office Box 1759
Victoria, Texas 77902

DATE: March 3, 1987

TO: M.L. Null

FROM: Larry R. Vaughn

SUBJECT: Response to Your Letter and to the Inquiry from the Justice Dept.

In response to the inquiries from the Justice Department, I shall attempt to describe what I believe to be the Board's intent in the policy that was adopted on October 23, 1986. In order to establish the history of that policy before explanation, the following is offered. The policy was submitted to the Board for first reading on October 23, 1986. A copy of that proposed policy is attached. (See exhibit #1.) During the Board meeting one Board member raised objections to the portion of the policy which stated that it takes two Board members to place an item on the agenda. After discussion a question was called and by a vote of 6 to 1 approved that policy on first reading but suggested changes be made in order to soften the language which made it a requirement that two Board members must

request every item on the agenda. The discussion at the Board meeting suggested there are many items which surface that any one member could request to be placed on the agenda. There are times when the issue needs support from more than one member.

During the November, 1986 meeting, the policy was submitted for second reading as revised. (See exhibit #2.) The major difference is the language which changed from requiring two Board members to endorse every item requested to any Board member being able to request an item on the agenda. But, depending on the nature of some items, the Board President may require the support of two members before placing that item on the agenda. That policy was ultimately approved and it is that policy in question by the Justice Department.

In an attempt to describe the Board's intent to the best of my ability, I believe it is safe to say that policy was intended for all Board members, not any one specific member. It places the same requirement on every Board member, not singling out any one member for the requirement. The purpose for the policy was to add structure to the School Board meetings. Meetings were very lengthy. Oftentimes discussion on items that didn't have any support whatsoever, caused lengthy meetings. The Board's intent was to have agenda items for Board meetings restricted to those pertaining to the business involved with the operation and governance of the school system. The rationale behind having two members to request an item on the agenda was that if two people did not support an issue, that issue had absolutely no chance of being considered and an equally unlikely chance of being passed.

Another aspect (See exhibit #3) states that there will be two times on the agenda for public participation. Any member of the general public may speak on agenda items prior to the Board action. This was a new addition. It allows the general public to address agenda items. Also, BED(Local) provides another opportunity at the end of the meeting for the general public to bring to the Board's attention any issue deemed necessary. This discussion *is not* limited to items which are on the agenda. Under this policy this Board will listen to the public concern and direct the Administration to do one of two things. (1) Take action to resolve the problem without the necessity of Board action. (2) Place that item on the agenda for the next Board meeting in the event it requires Board action. The policy does not restrict public input. It does, in fact, give the public more opportunity for input than previous policies.

The combination of these policies have created a more structured atmosphere for the business meeting of the District. Therefore, it appears to be successful. Since implementation, the business meetings have been less lengthy than in the past. Furthermore, at the present time, there has not been a request for an agenda item from anyone which has not been placed on the agenda in one form or another.